

FEDERAL MAGISTRATES COURT OF AUSTRALIA

AURPEERAPATTHANA v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 222

MIGRATION – Review of decisions – Delegate of the Minister for Immigration and Citizenship – Partner (Residence) (Class BS) visa.

Migration Act 1958, s.5F

Migration Regulations 1994, regs.1.03, 1.15A, Schedule 2 cl.801.221

Li v Minister for Immigration and Citizenship [2008] FCA 902; 102 ALD 354; 66 ACSR 594

Applicant:	NATTHAWAT AURPEERAPATTHANA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 1237 of 2010
Judgment of:	Riethmuller FM
Hearing date:	16 February 2011
Date of Last Submission:	16 February 2011
Delivered at:	Melbourne
Delivered on:	8 April 2011

REPRESENTATION

Counsel for the Applicant: Mr Fernandez
Solicitors for the Applicant: T A Fernandez
Counsel for the Respondent: Ms Burchell of Counsel
Solicitors for the Respondent: DLA Phillips Fox

ORDERS

- (1) The application filed on 7 September 2010 be dismissed.
- (2) The Applicant pay the costs of the First Respondent fixed in the sum of \$5,865.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE**

MLG 1237 of 2010

NATTHAWAT AURPEERAPATTHANA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant has applied for judicial review of a decision of the Minister for Immigration and Citizenship on 5 August 2010, which affirmed a delegate's decision to refuse to grant the applicant a Partner (Residence) (Class BS) visa ('the visa'). The applicant first applied for the visa on 25 January 2005. On 28 July 2008 the delegate refused to grant the visa on the basis that the applicant did not satisfy the delegate under clause 801.221 of Schedule 2 of the *Migration Regulations 1994* (Cth) that the parties were in a spousal relationship.
2. Regulation 1.03 sets out the relevant definition for such a partner relationship.

long-term partner relationship , in relation to an applicant for a visa, means a relationship between the applicant and another

person, each as the spouse or de facto partner of the other, that has continued:

(a) if there is a dependent child (other than a step-child) of both the applicant and the other person — for not less than 2 years; or

(b) in any other case — for not less than 3 years.

3. Regulation 1.15A(2) provides that when considering an application for a Partner (Residence) (Class BS) visa, the Minister must consider all of the circumstances of the relationship including the matters set out in regulation 1.15(A)(3):

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

4. The definition of a “married relationship” is referred to in s.5F of the *Migration Act*, which provides:

5F [Spouse]

(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

- (a) they are married to each other under a marriage that is valid for the purposes of this Act; and*
- (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- (c) the relationship between them is genuine and continuing; and*
- (d) they:*
 - (i) live together; or*
 - (ii) do not live separately and apart on a permanent basis.*

5. The Migration Review Tribunal ('MRT') was not satisfied that the applicant was a spouse of the sponsor. The MRT accepted the parties were married, but were not satisfied that they had chosen to continue living together or, at least, not live separately and apart on a permanent basis. The substance of the Tribunal's findings is set out at paragraphs [64] to [66] as follows:

[64] According to the evidence, the parties have been married for almost 6 years and for much of that time they have lived in different countries. According to the applicant, of the time that the sponsor has lived in Australia, she has not always lived with him. In considering the implications of r.1.15A(5) the Tribunal is satisfied that the parties have lived together at the same address for six months or longer however, the Tribunal is not satisfied that this factor overrides its findings that the applicant and the sponsoring spouse have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

[65] On the basis of the Tribunal's findings that the parties do not have a shared financial relationship; that they do not live together when the sponsor is in Australia; that they have not set up a household together; that they have not demonstrated that there is social recognition of them as spouses; and that they do not have a shared commitment to the relationship, the Tribunal is not satisfied that at the time of decision the applicant and the sponsoring spouse has a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is not satisfied that the relationship is genuine and continuing. They therefore do not meet the requirements of r.1.15A(1A)(b)(i) and r.1.15A(1A)(b)(ii) for a married relationship.

[66] Additionally, given the parties have spent the majority of their married lives living in different countries and not living together for a significant for a significant part of the time when the sponsor is in Australia, the Tribunal is not satisfied that at the time of decision the applicant and the sponsoring sponsor live together or do not live separately and apart on a permanent basis. Accordingly, they do not meet the requirements of r.1.15A(1A)(b)(iii) for a married relationship.

6. In approaching the matter, the Tribunal identified the factors that were required to be considered under the regulation. They examined the financial aspects of the relationship, and found that the parties did not have a shared financial relationship. The Tribunal noted that the parties had spent less than half of the time since they were married living

together, and that, other than a lease of a residential property in Victoria, there was no demonstration that they had set up a household together. Most importantly, the Tribunal noted that the applicant did not always live with her husband, even when she was in Australia. When examining the social aspects of the relationship, the Tribunal stated that most of the photographs were of the parties together, but without other people, save for their parents.

7. The significant feature of the case was the explanation for the sponsor spending most of her time living with her family in Thailand, rather than with her husband in Australia. The applicant explained that the wife's parents were elderly and ill, although these conditions were not acute nor did it place her parents at a level of need such as to require a carer. Culturally, however, the applicant said that she was required to care for her parents. The Tribunal concluded:

[62] ...These factors indicate to the Tribunal that the sponsor had a greater commitment to her parents, who have relatively common age-related medical conditions, and her family in Thailand than she does to the applicant in Australia. The Tribunal accepts that there is a cultural element to her conduct, but the Tribunal considers that she has little commitment to her marriage.

[63] The Tribunal also notes the applicant stated at the hearing that, when the sponsor was in Australia, she spent most of her time in her room, or staying with her friends.

8. The contentions of law by the applicant were as follows:

1. The Tribunal has failed to consider all of the circumstances of the relationship between the parties, the length of time the parties lived together since their marriage and whether their temporary staying apart was a strong indication that their relationship was not genuine and continuing.

2. The Tribunal has failed to give consideration to the powerful, strong and corroborative evidence as to the level of contact between the parties and in particular to the evidence of the sponsor at the hearing before the Tribunal.

3. Having found that there is a cultural element to the conduct that resulted in the current state of affairs, the Tribunal erred in assessing the parties on the financial aspects of the relationship,

the nature of the household, the social aspects of the relationship and the personal commitment to each other to find that the parties do not have a mutual commitment to each other or that their relationship is not genuine and continuing.

4. The findings of the Tribunal as to the relationship of the parties, is not supported by logical grounds.

5. The Tribunal has failed to ask of the sponsor all relevant questions regarding the relationship of the parties and a failure to take relevant considerations into account particularly the constant contact between the parties.

6. The Tribunal has failed to interpret the law correctly.

9. The applicant's case at the hearing was put on the basis that:
 - a) the Tribunal failed to have regard to all of the relevant evidence relating to the cultural issues that the parties then faced; and
 - b) the Tribunal failed to have regard to questions of whether or not the parties intended to have a child (relying on *Li v Minister for Immigration and Citizenship* [2008] FCA 902; 102 ALD 354; 66 ACSR 594).
10. A number of passages from the evidence before the Tribunal were cited, which had borne upon the question of the cultural reasons behind the sponsor spending so much of her time with her parents in Thailand. It is not incumbent upon the Tribunal to recount every piece of evidence, or every statement made in evidence, before them. It is incumbent upon the Tribunal to have regard to and take into account the evidence in the particular case. In this case the Tribunal accepted that "there is a cultural element of her conduct", and weighed that against the other facts and circumstances of the case. I am not persuaded that the Tribunal has failed to have regard to that evidence, nor failed to take it into account. I therefore find that this ground cannot succeed.
11. The facts in this case are very different from those as described by Jessup J in *Li v Minister for Immigration and Citizenship* [2008] FCA 902; 102 ALD 354; 66 ACSR 594, where there were previous relationships which had not resulted in children and specific desires of the parties to have children together.

12. The applicant referred to the findings in paragraph 65 of the decision:

...that the parties do not have a shared financial relationship; that they do not live together when the sponsor is in Australia; that they have not set up a household together; that they have not demonstrated that there is social recognition of them as spouses; and that they do not have a shared commitment to the relationship...

13. The applicant proceeded to identify evidence in the transcript which counsel for the applicant said favoured different findings. For example, at page 8 of the transcript it was said that the parties understood that the wife's family had to come first, because of the fact that they were her father and mother, and the cultural obligations as a Thai family. At page 9 of the transcript the applicant was asked why he had not returned to Thailand to live with his wife, given that he was a Thai citizen. The applicant responded:

The answer is she plans to come back to me very soon and I settle down in Australia already.

14. At page 20, line 11 of the transcript the husband stated that he and his wife spoke to each other every day. This is supported by documentary evidence of telephone records, from telephone accounts, supplied to the Tribunal, which were annexed to submissions referred to in the Tribunal decision.

15. The evidence of the parties' intentions with respect to building a household or having a child could best be described as a brief response, prompted by a question from the Tribunal. The relevant section of the transcript at page 22.06 reads:

Member – Have you had any discussions about getting houses or having children or anything like that?---We talk about the house but at the moment we haven't got money for the deposit, but the children, yes we talk about that.

16. Counsel for the applicant developed the proposition that the Tribunal failed to consider the couple's intention to have children from the case of *Li v Minister for Immigration and Citizenship* [2008] FCA 902; 102 ALD 354; 66 ACSR 594 on the basis that the Tribunal did not discuss the parties' plans for the future, despite having enquired about this at page 21.25 to 22 of the transcript. The applicant referred to other

passages in the transcript, including 26.24, 29.16, 29.21, 30.16, 30.26, 31.17, 32.04 and 33.12.

17. As with many applications of this type, the first respondent was able to point to other passages in the transcript and materials that support the Tribunal's findings. For example, pages 15 to 16, 22, 23 and 24 of the transcript. The first respondent was also able to point to the results of the home visit which are set out at page 201 of the court book.
18. Ultimately, it was a matter for the Tribunal as to the facts that it found. The real issue is whether the Tribunal failed to have regard to a relevant consideration in failing to specifically deal with the parties' future plans. This was not a case where concrete or specific plans were in place (unlike the case of *Li v Minister for Immigration and Citizenship* [2008] FCA 902; 102 ALD 354; 66 ACSR 594). The whole issue turned on whether the parties were living separately and apart on a permanent basis or not. The Tribunal explored this issue and made findings, based on specific facts. Had there been specific plans for the future, beyond the usual general intention of couples to obtain a home and have children, the Tribunal should have addressed those issues. Here, however, the expression of the intention to have children was not so specific as to result in a finding that the Tribunal failed to have regard to it because it is not set out in the reasons.
19. It is also argued that in paragraph [62] the Tribunal appears to have weighed the wife's commitment to her parents against her commitment to the marriage, concluding that:

...the sponsor has a greater commitment to her parents, who have relatively common age-related medical conditions, and her family in Thailand than she does to the applicant living in Australia...

20. Taken in isolation, that line may arguably indicate that the Tribunal have strayed from a consideration of the provision to a weighing of the emotional connections and obligations the wife might have to her husband compared to her parents. It is conceivable that in some relationships a wife may feel a strong sense of obligation to her parents, such that it even impinges upon her marriage. This, of itself, is not determinative. However, the balance of the passage indicates the

Tribunal did not treat it as determinative of the question. The Tribunal went on to state:

...The Tribunal accepts that there is a cultural element to her conduct but the Tribunal considers that she has little commitment to her marriage.

21. The Tribunal went on to note that, at the hearing, the applicant had stated that when the sponsor was in Australia, she spent most of her time in her room or staying with her friends.
22. It does not appear that the Tribunal's reasons, if read as a whole, indicate that they had fallen into such an error.
23. Finally, it was argued that the Tribunal had erred in failing to make a finding that the parties were living separately and apart on a permanent basis. This submission misconstrues the task that the Tribunal was required to undertake. The Tribunal had to determine whether it was satisfied that the subclauses of the relevant conditions for the visa were satisfied. As the Tribunal set out in paragraph 18:

[18] In the case of both married and de facto relationships, the Tribunal must be satisfied that there is a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing, and that the couple live together, or do not live separately and apart on a permanent basis: r.1.15A(1A)(b) and 1.15A(2)(c). In the case of a de facto relationship, the decision maker must be satisfied that these circumstances existed for the 12 months immediately preceding the date of application, unless the applicant can establish compelling and compassionate circumstances for the grant of the visa: r.1.15A(2)(d) and 1.15A(2A)(b).

24. For the Tribunal to not be satisfied did not logically require a finding in the negative form.
25. The Tribunal also had regard to the presumption that parties living together for six months or more is taken to be strong evidence of a genuine and continuing relationship, and that a shorter period of cohabitation cannot be taken as evidence that the relationship is not genuine and continuing only for that reason (see paragraph [20]).

26. The Tribunal were not required to determine either that the relationship was one within regulation 1.15, or alternatively that the parties were permanently separated. It is well accepted that the Tribunal could have reached a position where it was not satisfied either way, and in that circumstance the applicant's application must fail, as a relevant criteria has not been satisfied.
27. I find no error in the Tribunal approaching the matter in the way in which it did. I therefore refuse the application.

I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Riethmuller FM

Associate:

Date: 8 April 2011